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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~506~~ 224

THEODORE YATES, PLAINTIFF IN ERROR,

vs.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 5, 1878.

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SUPREME COURT OF THE UNITED STATES.

No. 506.

THEODORE YATES, PLAINTIFF IN ERROR,

vs.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

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1 Circuit court of the United States for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin:

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, on the first Monday (being the second day) of October, A. D. 1876—present & presiding the honorable Charles E. Dyer, district judge; Charles S. Hamilton, marshal; and Edward Kurtz, clerk—among other the following proceedings were had, to wit:

THEODORE YATES
vs.
THE NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers. } At law.

Be it remembered that heretofore, to wit, at a term of said court begun and held according to law, at the city of Milwaukee, in said district, on the first Monday (being the sixth day) of October, A. D. 1873, present the honorable Andrew G. Miller, district judge, presiding, and on the twenty-sixth day of said term, to wit, on the twenty-ninth day of December, A. D. 1873, the following proceedings were had, to wit:

2 *Order docketing the case.*

THEODORE YATES
vs.
THE NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers. } At law.

This day came the defendant, by its counsel, Messrs. Carpenter & Murphey, and presented to the court copies of the pleadings and proceedings in this cause, certified from the circuit court for Milwaukee County, within this district, pursuant to an order of said court removing said cause to this court, including copies of the petition and bond on the part of the defendant for such removal, and of said order of removal.

Whereupon it is ordered by the court that the said copies be filed, and that the cause be entered on the law docket of this court and be proceeded in as if it had been commenced herein by original process. Which certified copies are as follows, to wit:

(Certified copies from State court.)

Complaint.

Circuit court, Milwaukee County.

THEODORE YATES, PLAINTIFF,
vs.
THE NATIONAL HOME FOR DISABLED VOLUNTEER Soldiers, defendant.

3 The plaintiff in the above-entitled cause, by Palmer, Hooker & Pitkin, his attorneys, respectfully shows to this court and alleges

that the above-named defendant was at the several times herein mentioned and now is a corporation duly created and organized under and by virtue of an act of the Congress of the United States entitled "An act to incorporate a national military and naval asylum for the relief of the totally disabled officers and men of the volunteer forces of the United States," approved March 3rd, 1865, and an act amendatory thereto approved March 21st, 1866.

And the said plaintiff further alleges that on the 2nd day of January, A. D. 1869, the said defendant was engaged in the erection & construction of a building in the town of Wauwatosa, in the county of Milwaukee & State of Wisconsin, for the use of said defendant as a military asylum; that the site on which said building was being erected and constructed as aforesaid had theretofore been duly selected and procured by said defendant for that purpose, and that on or about the 2nd day of January, A. D. 1869, the said plaintiff & defendant entered into a contract wherein and whereby the said plaintiff promised and agreed to perfect the plans, arrange all details for each department, direct the work, employ all labor, purchase all material, and put the institution in proper working order for the compensation for his service of five per cent. of the amount of the purchases of material and
4 disbursements for labor that had been or that might thereafter be made by him, or under his direction, in the construction & completion of said building, outside of contracts for masons', roofers', and steam-heaters' work, and wherein and whereby the said defendant employed the said plaintiff to do said work and perform said service and promised and agreed to pay him therefor the sum of five per cent. of the amount of said purchases and disbursements.

And the said plaintiff further alleges that in pursuance of the said contract and in compliance with the terms thereof he perfected the plans, arranged all details for each department, directed the work, employed all labor, purchased all material, and put the institution in proper working order in the construction and completion of said building to the acceptance of the said defendant prior to the expiration of the year 1869, and duly performed all the conditions on the said contract on his part; and that the said purchases and disbursements, outside of contracts for masons', roofers', and steam-heaters' work amounted to the sum of one hundred & sixty-eight thousand and two hundred and ninety-nine dollars and thirty cents; that five per cent. of the amount of said purchases and disbursements amounts to the sum of eight thousand four hundred & fourteen dollars and ninety-six
5 cents; and that the said defendant thereupon became indebted to the said plaintiff upon the said contract in the said sum of eight thousand four hundred and fourteen dollars and ninety-six cents; that said plaintiff has demanded payment of said sum from the said defendant, but that said defendant has refused & still refuses to pay the same. That no part thereof has been paid except the sum of fifteen hundred dollars, and that there is now due to the said plaintiff from the said defendant upon the said contract the sum of six thousand nine hundred and fourteen dollars and ninety-six cents with interest thereon from the first day of January, A. D. 1870.

And the said plaintiff for a second separate and further cause of action alleges that in the year 1867 he was appointed and employed by the defendant as deputy governor of the Northwestern Branch of the National Asylum for Disabled Volunteer Soldiers, located in the town of Wauwatosa, in county of Milwaukee, in the State of Wisconsin; that he thereupon entered upon the discharge of his duties as such deputy

governor, and continued therein until the first day of January, A. D. 1870; that his salary as such deputy governor was payable monthly; that his salary for the month of December, A. D. 1869, has not been paid; that his salary for said month of December, 1869, as fixed by said defendant, amounted to the sum of one hundred and seventy-
6 five dollars; that he has demanded payment from said defendant of his said salary for said month of December, 1869, but that the said defendant has refused and still refuses to pay the same or any part thereof, and that the said defendant is now indebted to this plaintiff on account of said salary in the sum of one hundred and seventy-five dollars, with interest thereon from the first day of January, A. D. 1870.

Wherefore the plaintiff demands judgment against the said defendant for the sum of seven thousand and ninety-four dollars and ninety-six cents, with interest thereon from the first day of January, A. D. 1870, together with the costs of this action.

PALMER, HOOKER & PITKIN,
Plaintiff's Attorneys.

STATE OF WISCONSIN,
Milwaukee County, ss:

Theodore Yates, being duly sworn, says that he is the plaintiff in this action; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information & belief, and that as to those matters he believes it to be true.

THEO. YATES.

Subscribed & sworn to before me this 6th day of November, 1873.
HORACE L. PALMER,
7 *Notary Public, Milwaukee County, Wisconsin.*

(Endorsed:)
Due service admitted this 7th day of November, 1873.
CARPENTER & MURPHEY.

United States circuit court, eastern district of Wisconsin.

THEODORE YATES
vs.
THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

GENTLEMEN: Please take notice that we are retained as attorneys for the defendant in the above-entitled action, and hereby in pursuance of the stipulation heretofore made in said action and in pursuance of law demand that a copy of the complaint in this action be served on us at our office in the city of Milwaukee, in the State of Wisconsin.

Dated Milwaukee, October 11th, 1873.
CARPENTER & MURPHEY.

To Messrs. PALMER, HOOKER & PITKIN.

(Endorsed:) Served Oct. 11, '73. Filed Dec. 4, '73. Patrick Connolly, jr., cl'k.

Petition for removal of cause.

Circuit court, Milwaukee County.

THEODORE YATES
vs.
THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

8 STATE OF WISCONSIN,
Milwaukee County, ss:

To the circuit court of Milwaukee County:

The petition of The National Home for Disabled Volunteer Soldiers, the defendant in the above-entitled action, respectfully shows to the court:

First. That under and by virtue of the provisions of an act of Congress of the United States entitled "An act to amend an act entitled an act to incorporate a national military and naval asylum for the relief of totally disabled officers and men of the volunteer forces of the United States," approved March 21, 1866, the defendant was duly created a corporation and at all times since that time has existed such corporation under the laws of the United States.

Second. That on the 19th day of August, 1873, at the city of Milwaukee this action was commenced by Theodore Yates, said plaintiff, against your petitioner by the service of summons upon it in an action at law to recover the sum of seven thousand ninety-four and $\frac{96}{100}$ dollars damages, with interest thereon from the first day of January, 1870, upon an alleged liability of said corporation to the said plaintiff, and that no issue has been joined in said action.

Third. That your petitioner has a good and valid defense to the said action arising and existing under the laws of the United States,
9 and that the matter in dispute exceeds the sum of five hundred dollars exclusive of costs.

Fourth. Your petitioner therefore prays that this cause may be removed into the circuit court of the United States for the eastern district of Wisconsin, as provided by an act of Congress entitled "An act for the removal of cases from State courts," approved July 27th, 1866, and the act amendatory thereof entitled "An act to amend an act entitled 'An act for the removal of causes in certain cases from the State courts,'" approved March 2d, 1867, and the provisions of an act entitled "An act supplementary to an act entitled 'An act to allow the United States to prosecute appeals and writs of error without giving security, and for other purposes,'" approved July 27th, 1868.

And your petitioner hereby offers good and sufficient security for its entering in said circuit court of the United States for the eastern district of Wisconsin on the first day of its session copies of all process, pleadings, depositions, testimony and other proceedings in this suit in this court, and for doing such other appropriate acts as by the said acts of Congress are required to be done in the premises, and that this court refrain from proceeding any further in this suit. And that your petitioner may have such other or further order as may be proper.

Dated Milwaukee, September 25th, 1873.

BENJ. F. BUTLER,
President of Board of Managers of National Home of Disabled Volunteer Soldiers.

10 STATE OF WISCONSIN,
Milwaukee County, ss:

Benjamin F. Butler, being duly sworn, says that he is president of the above-named defendant, The National Home for Disabled Volunteer Soldiers; that he has read the foregoing petition subscribed by him in behalf of the said defendant, and knows the contents thereof, and that the same is true to the knowledge of this deponent except as to those matters which are therein stated on information and belief, and as to those matters he believes to be true.

BENJ. F. BUTLER,
President, &c., &c.

Sworn to before me this 25th day of September, 1873.
[SEAL.] A. A. L. SMITH,
Notary Public, Mil. Co., Wis.

(Endorsed:) Filed Oct. 6th, 1873. Patrick Connolly, jr., clerk.

Bond on removal.

Know all men by these presents that we, E. B. Wolcott and O. P. Wolcott, both of the city and county of Milwaukee, in the State of Wisconsin, acknowledge ourselves to owe and be indebted unto Theodore Yates of said city in the penal sum of three hundred dollars, for the payment of which we hereby bind ourselves, our heirs, executors, administrators, and assigns, jointly, severally, and firmly by these presents.

Signed and sealed this fourth day of October, 1873.

11 The condition of the foregoing obligation is such that whereas the said Theodore Yates has lately brought a civil action in the circuit court of Milwaukee County against The National Home for Disabled Volunteer Soldiers, a corporation created and existing under and by virtue of the laws of the United States; and whereas said defendant is about to apply for a removal of said action before trial from said circuit court to the circuit court of the United States for the eastern district of Wisconsin:

Now if such removal be made in accordance with the prayer of said defendant, and the said defendant shall enter in the said United States court on the first day of its session thereof the copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and do such other appropriate acts as by law are required to be done in such like case, then this obligation to be void, otherwise of force.

E. B. WOLCOTT. [SEAL.]
O. P. WOLCOTT. [SEAL.]

In presence of—

(Endorsed:) Filed Oct. 6th, 1873. Patrick Connolly, jr., clerk.

Stipulation.

Circuit court, Milwaukee County.

THEODORE YATES
vs.
THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

It is hereby agreed that all proceedings on the part of plaintiff
12 and defendant be and the same are stayed without prejudice to either party till the defendant shall have an opportunity at the

October term, 1873, of this court to apply for a change of the place of trial of said action to the circuit court of the United States for the eastern district of Wisconsin. And if such application be granted it is agreed that thereupon the pleadings shall be served and filed in all respects as if said cause remained in this court so far as time is concerned, and shall be considered and received by the parties the same as if served before such change of the place of trial, & pl'ff is authorized to change name of def't as above entitled.

Sept. 3, 1873.

CARPENTER & MURPHEY,
Defendant's Attorneys.
PALMER, HOOKER & PITKIN,
Pl'ff's Att'ys.

(Endorsed:) Filed Oct. 11, 1873. Patrick Connolly, jr., clerk.

Order of removal.

Circuit court, Milwaukee County.

THEODORE YATES, PLAINTIFF,
ag'st
THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, defendant.

The application of the above-named defendant for the removal of this action for trial to the circuit court of the United States for the eastern district of Wisconsin coming on for hearing, and it ap-
13 pearing by the petition of the defendant duly verified that the defendant is a corporation created under the laws of the United States, and that the defendant has a good and valid defence to the alleged cause of action on which this suit is brought, and that the same involves a sum exceeding five hundred dollars exclusive of costs, and a bond having been given as required by law after hearing N. S. Murphey for the motion and Mr. Palmer contra,

It is ordered by the court now here that this court proceed no further with this suit, and the same is hereby certified and returned to the said circuit court of the United States for the eastern district of Wisconsin, in pursuance of law in that behalf enacted.

Dated Milwaukee, October 11th, 1873.

By the court.

DAVID W. SMALL, *Judge.*

Copy of docket entries.

October term, 1873.

Palmer, Hooker & Pitkin.

THEODORE YATES
against
THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

Carpenter & Murphey.

October 6, 1873.—And now comes the defendant in the above-entitled

action, by Carpenter & Murphey, its attorneys, and files petition for removal of this cause to the United States circuit court for the eastern district of Wisconsin. Same time defendant, by Carpenter &
14 Murphey, its attorneys, move the court for removal, and Palmer, Hooker & Pitkin on behalf of the plaintiff in opposition thereto. The court reserves its decision. Same time, bond on removal filed.

October 11, 1863.—Stipulation & order of removal filed as follows: The application of the above-named defendant for the removal of this action for trial to the circuit court of the United States for the eastern district of Wisconsin coming on for hearing, and it appearing by the petition of the defendant duly verified that the defendant is a corporation created under the laws of the United States, and that the defendant has a good and valid defense to the alleged cause of action on which this suit is brought, and that the same involves a sum exceeding five hundred dollars exclusive of costs, and a bond having been given as required by law, after hearing N. S. Murphey for the motion and Mr. Palmer contra, it is ordered by the court now here that this court proceed no further with this suit, and the same is hereby certified and returned to the said circuit court of the United States for the eastern district of Wisconsin, in pursuance of law in that behalf entitled.

By the court.

Dated Milwaukee, October 11th, 1873.

DAVID W. SMALL, *Judge.*

December 4, 1873.—Complaint & notice of retainer filed as follows:

GENTLEMEN: Please take notice that we are retained as at-
15 torneys for the defendant in the above-entitled action, and hereby in pursuance of the stipulation heretofore made in said action and in pursuance of law demand that a copy of the complaint in this action be served on us at our office in the city of Milwaukee, in the State of Wisconsin.

Dated Milwaukee, Oct'b'r 11, 1873.

CARPENTER & MURPHEY,
Def't's Att'ys.

To Messrs. PALMER, HOOKER, & PITKIN:
Pl'ff's Att'ys.

Clerk's certificate.

STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss :

I, Patrick Connolly, jr., clerk of said court, do hereby certify that I have compared the foregoing copy with the original record and proceedings entered in the action therein entitled; that it is a correct transcript therefrom, and of the whole thereof, as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 10th December, A. D. 1873.

[SEAL.] PATRICK CONNOLLY, JR.,
Clerk.

By D. N. CASSON,
Dep. Clerk.

STATE OF WISCONSIN,
County of Milwaukee, ss :

I, David W. Small, do hereby certify that I am judge of the 2nd ju-

dicial circuit in said State, and presiding judge of the circuit court
16 within and for the county of Milwaukee; that Patrick Connolly, jr., whose name is subscribed to the certificate subjoined to the within record is and was at the date of said certificate clerk of the circuit court for the county of Milwaukee and State aforesaid, duly elected and qualified; that I am well acquainted with his handwriting and know the signature thereto to be genuine; and further, that said certificate or attestation is in due form of law, and that the seal thereto attached is the proper seal of said court.

Witness my hand, at Milwaukee, this 10th day of December, A. D. 1873.

DAVID W. SMALL.

Continuance.

April 23, 1874.—This day came the defendant's counsel, and on their motion and affidavit filed, it is ordered by the court that this cause be and hereby is continued.

Answer.

July 13, 1874.—This day came the defendant by its attorneys, Messrs. Carpenter & Murphy, and filed its answer, as follows:

Circuit court of the United States, eastern district of Wisconsin.

THEODORE YATES
vs.
17 THE NATIONAL HOME FOR DISABLED Volunteer Soldiers.

The defendant in this action, for answer to the first cause of action set forth in the complaint, denies each and every allegation therein contained except as hereinafter expressly admitted. The defendant admits that it is a corporation duly created by act of Congress as set forth in said complaint, and by virtue of certain other acts of Congress supplementary thereto and amendatory thereof. The defendant further admits that it was engaged in the construction of a building in the town of Wauwatosa, in the county of Milwaukee, in and during the year 1869.

And the defendant for a further answer to said complaint and to the second alleged cause of action therein contained denies each and every allegation therein contained.

And the defendant for a further answer and defense to both the said pretended causes of action set forth in said complaint alleges from the year 1867 to the year 1869, both inclusive, the said plaintiff was an officer in the military service of the United States on the retired list of the Army, with and at all times during said years holding the
18 rank and commission & drawing the pay of colonel in the United States Army on the retired list, and so continued to draw such pay during the whole of the period aforesaid as such officer from the United States Government; and this defendant is advised and submits and insists that the plaintiff under the laws of the United States is entitled to no other or further compensation from the defendant or from the United States for any service performed by him for the defendant or the United States than his said pay as colonel on the retired list in the United States military service as aforesaid.

And this defendant for a further defence and counter-claim to the alleged cause of action set forth in said complaint alleges on information & belief that the 10th day of December, 1868, in pursuance of a resolution of the board of managers of the defendant, the plaintiff was appointed acting treasurer of the Northwestern Branch of the defendant, without compensation, to take effect on the first day of January, 1869; that the plaintiff accepted said appointment as made, and as such treasurer thereafter became possessed of large amounts of moneys the property of the defendant, the amounts and
19 particulars whereof are unknown to the defendant, some portions of which moneys, the amount of which the defendant is unable to state, were afterward disbursed by the plaintiff for the benefit of the defendant, and a large amount of the said moneys were thereafter and during the time that the plaintiff acted as such treasurer applied to his own individual use and benefit without the knowledge or consent of the defendant. That the amount of such moneys so applied by the plaintiff to his own use as aforesaid and so as aforesaid wrongfully applied amounted in the aggregate to the sum of six thousand nine hundred ninety-four & $\frac{71}{100}$ dollars, and the same was as the defendant is informed & believes so applied by the plaintiff monthly in equal amounts during the period of the plaintiff's acting treasurership, which ceased October 19th, 1869, except the sum fifteen hundred dollars thereof which was so applied wrongfully as aforesaid to the plaintiff's use by him on the last-named day. That the plaintiff has neglected and refused to pay to the defendant the said sum of $6,994.71 dollars, or any part thereof, and is now lawfully indebted to the said defendant by reason of the premises
20 in the sum of $6,994.71 dollars, with interest thereon from the days and dates that the same was so wrongfully applied to the use of the plaintiff as aforesaid.

Wherefore the defendant prays judgment against the plaintiff for the said principal sum of $6,994.71, besides interest thereon from the days and dates aforesaid, besides costs of suit.

CARPENTER & MURPHEY,
Defendant's Att'ys.

EASTERN DISTRICT OF WISCONSIN, *ss:*

I, Edward W. Hincks, being duly sworn, say I am deputy governor of the National Home for Disabled Volunteer Soldiers, the above-named defendant; that I have read the above and foregoing answer and know the contents thereof and that the same is true of my own knowledge, except as to those matters which are therein stated on information & belief, & as to those matters I believe it to be true.

EDW. W. HINCKS,
Dept. Gov'r Nat. Home.

Sworn to before me this 19th day of November, 1873.

A. A. S. SMITH,
Not. Pub. Mil. Co., Wis.

Reply.

July 14, 1874.—This day came the plaintiff by his attorneys Messrs. Palmer, Hooker & Pitkin and filed his reply as follows:

21 U. S. circuit court, eastern district of Wisconsin.

THEODORE YATES
agst.
THE NATIONAL HOME FOR DISABLED VOLunteer Soldiers.

The plaintiff in this action by Palmer, Hooker and Pitkin, his attorneys, for a reply to that part of the defendant's answer constituting a counter-claim, admits that he was appointed acting treasurer of the northwestern branch of the defendant & that he accepted said appointment as stated in said answer; said plaintiff admits that as such treasurer he became possessed of large amounts of money, the property of the defendant, and says that the whole amount thereof was disposed of by the plaintiff for the benefit of the defendant and in pursuance of the directions of the defendant.

And the said plaintiff denies each and every allegation, matter, and thing in that part of said answer constituting a counter-claim, except so far as the same are hereinbefore specifically admitted, qualified, or denied.

Wherefore the said plaintiff demands judgment against the said defendant in accordance with the prayer of his complaint.

PALMER, HOOKER & PITKIN,
Pl'ff's Att'ys.

STATE OF WISCONSIN,
Milwaukee County, ss:

22 Theodore Yates, being duly sworn, says that he is the plaintiff in this action; that he has heard read the foregoing reply and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated upon information and belief, andthat as to those matters he believes it to be true.

THEO. YATES.

Subscribed and sworn to before me this 8th day of December, A. D. 1873.

HORACE L. PALMER,
Notary Public, Milwaukee County, Wisconsin.

And afterwards, to wit, at a stated term of said court, begun and held according to law, at the city of Oshkosh, on the second Tuesday (being the fourteenth day) of July, A. D. 1874—present, the honorable James C. Hopkins, judge presiding; on the second day of said term, to wit, on the fifteenth day of July, A. D. 1874—the following proceedings were had, to wit:

First trial.

THEODORE YATES
vs.
THE NATIONAL HOME FOR DISABLED VOLunteer Soldiers. } At law.

This day came the parties by their counsel and the issue herein
23 came on to be tried, when the parties entered into a written stipulation as herein filed, to wit: "In this cause the parties hereby stipulate to waive a trial by jury and to try the same before the court without the intervention of a jury. Dated Oshkosh, July 15, 1874.

(Signed) Dixon, Hooker & Palmer, att'ys for pl'ff. Carpenter & Murphy, att'ys for defendant."

Whereupon the said issue was tried by the court, and, being argued by Mr. Dixon for the plaintiff and by Mr. Carpenter for the defendant, and submitted, the court took the same under advisement.

And afterwards, to wit, at a term of said court begun and held according to law at the city of Milwaukee, on the first Monday (being the fifth day) of October, A. D. 1874, and on the second day thereof, to wit, on the sixth day of October, A. D. 1874, the following proceedings were had, to wit:

Finding & judgment vs. plaintiff.

THEODORE YATES
vs.
THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS. } At law.

The following order was received from Hon. J. C. Hopkins, who presided during the July term at Oshkosh, and before whom the case was tried, to wit:

This action having been brought to trial before the court (a jury having been duly waived) after hearing the proofs and allegations of
24 the parties, and due deliberation being had thereon, the court doth find that the defendant is not indebted to the plaintiff in manner and form as alleged, and therefore orders judgment for the defendant, with costs to be taxed.

Whereupon it is considered and adjudged by this court now here that the plaintiff take nothing by his suit and that the defendant do have and recover of the said plaintiff, Theodore Yates, twenty-four dollars and thirty cents, its costs about its said defense in this behalf by it expended and that it have execution therefor.

Judgment roll signed October 6th, A. D. 1874.

Costs, 24.30.

EDWARD KURTZ, *Clerk.*

October 16, 1874.—This day came the plaintiff by his attorneys and filed exceptions to the finding of the court, as follows:

Exceptions to finding of court.

United States circuit court, eastern district of Wisconsin.

THEODORE YATES
vs.
THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS. }

And now comes the said plaintiff by Dixon, Hooker & Palmer, his attorneys, and excepts to the decision of the court filed and entered in the above entitled action upon the grounds—

25 1st. That the said decision is contrary to the evidence.

2d. That the said decision is contrary to the law.

3d. Because the judge did not state in his decision separately: 1st. The

facts found by him; and, 2d, his conclusions of law thereon as he was required by law to do.

DICKSON, HOOKER & PALMER,
Pl'ff's Att'ys.

Dated Oct. 14, 1874.

October 16th, 1874.—This day came the plaintiff by his counsel and moved the court to vacate and set aside the judgment heretofore entered in this cause, and to file a decision thereon, as follows:

Motion to set aside judgment.

To Messrs. CARPENTER & MURPHY:

GENTL'N: Please take notice that the within motion will be filed and submitted to the court on the 23d day of Oct., 1874, at the opening of court on that day or as soon thereafter as counsel can be heard. Dated Oct. 14, 1874.

DIXON, HOOKER & PALMER,
Pl'ff's Att'ys.

Service admitted Oct. 15th, 1874.

N. S. MURPHEY.

United States circuit court, eastern district of Wisconsin.

THEODORE YATES.
vs.
THE NATIONAL HOME FOR DISABLED VOLunteer Soldiers.

26 And now comes the said plaintiff and moves the court to vacate and set aside the judgment heretofore entered in the above entitled action, and to file a decision in said action, in which the judge shall state separately: 1st. The facts found by him; and, 2d, his conclusions of law thereon; or that, notwithstanding the said judgment, such decision be filed and entered nunc pro tunc, for and in the place of the decision heretofore filed, and that the said plaintiff be allowed to file exceptions thereto nunc pro tunc.

This motion is made to enable the plaintiff to secure such exceptions to the decision of the court as the law guaranties to him for the purposes of review on writ of error.

DIXON, HOOKER & PALMER,
Pl'ff's Att'ys.

Motion for new trial.

November 16, 1874.—This day came the plaintiff by his counsel and moved the court upon special leave first granted therefor to set aside the finding and judgment entered herein, and for a new trial, for reasons filed, as follows:

Circuit court of the United States, eastern district of Wisconsin.

THEODORE YATES
vs.
27 THE NATIONAL HOME FOR DISABLED
Volunteer Soldiers.

And now comes the said plaintiff and moves the court now here, upon

special leave first granted therefor, to set aside the finding and the judgment entered thereon, and for a new trial in the above entitled cause, upon the grounds—

1st. That the said finding is contrary to the law.

2nd. That the said finding is contrary to the evidence.

DIXON, HOOKER & PALMER,
Pl'ff's Att'ys.

July 13, 1876.—This day came the plaintiff, by his counsel, and on his motion it is ordered by the court that the motion for a new trial herein be continued to the August term.

Order granting a new trial.

August 4, 1876.—This day came the parties, by their counsel, and the motion of the plaintiff for a new trial came on to be heard; and was argued by Mr. L. S. Dixon, for the plaintiff, and by Mr. Murphey in opposition, on behalf of the defendant.

On consideration whereof it is ordered by the court that a new trial be and hereby is granted upon payment of the costs as taxed, and that thereupon the judgment heretofore entered in this cause be vacated.

28 And now at this same term, to wit, and on the fifth day thereof, to wit, on the thirteenth day of October, A. D. 1876, the following proceedings were had, to wit:

Second trial.

THEODORE YATES
vs.
THE NATIONAL HOME FOR DISABLED VOLunteer Soldiers. } At law.

This day came the parties by their counsel—Mr. L. S. Dixon appearing for the plaintiff, and Mr. Carpenter for the defendant—and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit, C. P. Taylor, B. H. Bettis, Hiram Edgerton, Levi M. Tompkins, John Ewing, Wellington Hendrix, Homer Glass, Daniel Williams, Peter Myers, C. L. Douglass, Clinton Gait, and M. W. Simmons, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and the trial not being concluded the same was ad- until to-morrow morning.

And afterwards, to wit, on the 6th day of said term, to wit, on the 14th day of October, A. D. 1876, the following proceedings were had, to wit:

This day came the parties, by the counsel, and the trial of the issue herein was resumed, and not being concluded the same was ad-
29 journed until the tenth day of November next.

And afterwards, to wit, on the 22nd day of said term, to wit, on the 10th day of November, A. D. 1876, the following proceedings were had, to wit:

Verdict.

THEODORE YATES
vs.
THE NATIONAL HOME FOR DISABLED VOLunteer Soldiers. } At law.

This day came the parties, by their counsel, and the trial of the issue herein was resumed. And the jurors of the jury aforesaid being charged by the court on their said oaths, respectively, do say that they find the issue herein in favor of the defendant; and came the plaintiff, by his counsel, and moved the court for a new trial for reasons filed, as follows:

Motion for new trial.

U. S. circuit court, east. dist. of Wis.

THEODORE YATES
vs.
THE NATIONAL HOME FOR DISABLED VOLunteer Soldiers.

And now comes the said plaintiff and moves the court to set aside the verdict in this action, and for a new trial therein, upon the grounds that:

1st. The said verdict is contrary to law, and—

2nd. The said verdict is contrary to the evidence.

DIXON, HOOKER, WEGG & NOYES,
Pl'ff's Att'ys.

30 *Order overruling motion for new trial.*

And said motion being submitted by the counsel of the parties, on consideration thereof it is ordered by the court that the said motion be and hereby is overruled.

Judgment.

Whereupon it is considered and adjudged by this court now here that the said plaintiff take nothing by his writ, and that the said defendant do have and recover of the said plaintiff, Theodore Yates, twenty-eight dollars and eighty cents, its costs about its said defense in this behalf by it expended, and that it have execution therefor.

Judgment roll signed November 10th, A. D. 1876. Costs $28.80.

EDWARD KURTZ, *Clerk.*

Judgment roll filed November 10th, A. D. 1876, at five o'clock p. m.

EDWARD KURTZ, *Clerk.*

Bill of exceptions.

December 28, 1876.—Bill of exceptions signed and filed as follows:

THEODORE YATES
vs.
THE NATIONAL HOME FOR DISABLED VOLunteer Soldiers.

Be it remembered that, on the day of October, A. D. 1876, came

the said plaintiff, by Dixon, Hooker, Wegg & Noyes, his attorneys, and the said defendant by Carpenter & Murphey, its attorneys, before
31 the honorable Charles E. Dyer, presiding judge, and said cause being called for trial, a jury was duly empanneled and sworn, and thereupon the said plaintiff offered and read in evidence, subject to objection on the part of said defendant, the contract on which said suit was based, which is in the words and figures following, to wit:

MILWAUKEE, WIS., *Dec. 28th*, 1868.

Gen. JOHN S. CAVENDER and E. B. WOLCOTT, M. D., *Managers of the National Asylum for D. V. S. and Building Com. for the N. W. Branch:*

GENTLEMEN: Under your instructions I made plans for the interior of the present asylum building at this place, and the work completed under my supervision has been approved by each and all of the managers by whom it has been inspected.

You expressed a wish that I would make or revise the plans for the new principal building now in course of erection, and in the belief that it would result in a very considerable saving in cost, avoid the necessity for any extensive alterations, and be more perfectly adapted to the purpose for which it was designed, I have purchased all material, employed all labor, and directed all work not included in contracts of mason and tin and iron workers. You know what changes have been made in plans of the architect, what is contemplated, and the time and
32 study that must be given to this work. Mess. Smyth and Gunckel, when here for the purpose of inspection, expressed themselves very much pleased with all that had been done, and were evidently greatly surprised at the small cost involved and contemplated. Gov. Smyth was kind enough to say to me, "If you can make of our new building comparatively all you have made of this, the old one, we will have the best building for the purpose in the world."

In subsequent discussion of questions of economy both of those gentlemen said to me, "We do not ask or expect that you will or can do more than you are doing now. We are entirely satisfied with you in all respects; we don't know where we can find a man to fill your place. In any changes we may contemplate you are not to be considered, and the only complaint we have to make, so far as concerns you, is that your pay is too small in proportion to the service you are rendering us, and it ought to be increased."

At a meeting of your board a few days later those gentlemen voted to add to my duties and responsibilities and to reduce my pay. Unaccustomed to such evidences of appreciation of my very "valuable services," and seeing no prospect of credit or reward for my voluntary
33 labors, I am disinclined to assume further trouble or responsibility except for a fair consideration, particularly as my reputation is being constantly assailed by interested persons who claim that I have stood, and do stand, between them and a liberal legitimate profit in this work. In construction of the first buildings you had to pay a sup't a liberal price for his presence, paid his transportation to and fro, paid the maximum price for labor employed by him at the minimum, and paid him, besides, 5 per cent. on am't of all purchases made, and this after all plans were made by myself. I am able and willing still to perfect the plans, arrange all details for each dep't, direct the work, employ all labor, purchase all material, and put the institution in proper working order, provided the nat. asylum will pay me 5 per cent. on the purchases and disbursements that have been or may be made by me or

under my direction, outside of contracts for masons, roofers, and steam-heaters' work until completion of the building; otherwise I decline to assume or feel any further responsibility for anything connected with construction at this asylum.

Mr. Morris, employed by me, now receives more per diem than I do, and earns it all. I know that by proper arrangement of details expen-
34 sive alterations may be avoided and much saved in cost of operation when all is done. Care and judgment in selection and purchase of terial, &c., will insure economy in service, and I am pleased to feel that thus far I have been able to save the asylum more than I can ever hope to receive in the way of compensation. Under existing circumstances I cannot afford to give gratuitously the time and study still needed to carry this work through, particularly as the whole credit, if any is to be gained, may go to those whose sense of generosity, or justice even, has not yet been manifested.

I am, sirs, respectfully, your ob'd't serv't,

THEO. YATES.

[U. S. rev. stamp, 40 cents, cancelled.]

Col. Theo. Yates will complete the work as proposed, and will be paid in the manner and to the amount herein named.

E. B. WOLCOTT,*
JOHN S. CAVENDER,
Building Com. Nat. Asylum.

Signed by Gen. Cavender at St. Louis, Mo., Dec. 31, 1868, and by Dr Wolcott at Milwaukee, Wis., Jan'y 2d, 1869.

Under a stipulation in said cause made between the parties on the 11th day of July, 1874, in the following language, viz, "It is hereby stipulated that the printed pamphlets entitled Minutes of the
35 Proceedings of the Board of Managers of the National Asylum for Disabled Volunteer Soldiers, for the years 1866 to 1870, inclusive, and all others, may be used in evidence upon the trial of this cause, by either party, with the same force and effect as if the originals or duly certified or exemplified copies thereof were produced and read before the court and jury," the said plaintiff offered and read from said pamphlet, subject to objection on the part of the defendant, the following:

At a meeting of the board of managers, held on Friday, April 12th 1867, among other things, this motion was made and carried: "On motion, the president was authorized to appoint a committee to select a plan for asylum buildings at Milwaukee, to make and accept proposals for the same, to superintend their construction, and put the present buildings in condition for immediate use. The president appointed as said committee Dr. Wolcott and General Cavender." Also from page 13 of said pamphlet the following: "On motion, it was unanimously agreed that the president be made a member of each of the several committees appointed yesterday and to-day."

Thereupon the plaintiff was produced as a witness in his own behalf, who, being sworn, testified, subject to objection on the part of the defendant, as follows:

I am plaintiff—the party named in the contract. The contract was signed by Dr. Wolcott and General Cavender in my presence. I
36 purchased the material used, employed the labor expended on the building, outside of certain contracts made. Part of my duty was revising the plans originally made, and suggesting such plans for

*Action of Gen. Cavender approved, believing it for the best interests of the asylum.

alteration as approved by the committee. I was engaged in that service about two years. I rendered an account for those services to Dr. Wolcott, the local manager. This is a statement of my account: The amount at the sum specified in my contract was $8,414.96; a portion of it was paid—$1,500. It was all paid, if that is a proper answer. This is the account I submitted, and which was approved by Dr. Wolcott, and upon which I was paid.

Plaintiff's counsel then offered and read in evidence, subject to objection on the part of the defendant, two statements of account, in the words and figures following:

The National Asylum for Disbaled Volunteer Soldiers, N. W. Branch, to Theodore Yates, Dr.

To services on cons. ac. by order of building com..... $5,000 00

I certify the above account is correct and just, and that the expenditure was necessary for the asylum.

E. B. WOLCOTT,
Manager.

Approved.
E. B. WOLCOTT,
Manager.

Received at Milwaukee, Wis., the 12th day of September, 1869, of E. B. Wolcott, five thousand dollars in full of the above account.
(Signed duplicates.) THEODORE YATES. [Canceled.]

37 *The National Asylum for Disabled Volunteer Soldiers, N. W. Branch, to Col. Theodore Yates, Dr.*

For services as sup't of construction, as per contract..... $1,987 27

I certify that the above account is correct and just, and that the expenditure was necessary for the asylum.

E. B. WOLCOTT,
Manager.

Approved.
E. B. WOLCOTT,
Manager and Building Com.

Received, at Milwaukee, Wis., the 10th day of November, 1869, of E B. Wolcott, M. D., nineteen hundred and eighty-seven & $\frac{27}{100}$ dollars in full of the above account.
(Signed duplicates) THEO YATES. [Canceled.]

Witness continued as follows:

I remarked that this money was all paid to me once; it was not finally paid; it was refunded in part. All was refunded, less $1,500, to Dr. Wolcott as manager. It was paid to me by Dr. Wolcott as manager and building committee. I was at the institution from September, I think, 1867, to the first of January, 1870, and this service was all rendered between those dates. The work I performed was under the direction of General Cavender and Dr. Wolcott, and the buildings were constructed under the management of Dr. Wolcott and the directors. Dr. Wolcott, as the responsible manager, had almost entirely the management and control of the construction of those buildings, and the expenditure of the moneys out there for that purpose; but he advised

with his fellow committeemen when they visited here; but the expenditures from time to time were made under his direction, and the
38 payments under his check. Dr. Wolcott made the contracts.

Plaintiff's counsel, for the purpose of showing what authority Dr. Wolcott in fact exercised as local manager, offered in evidence an agreement made on the 23d day of November, 1868, between Tascomb & Co., of the city of Philadelphia, and the National Asylum for Disabled Volunteer Soldiers, for putting in the steam works, heating apparatus, in the Soldiers' Home, and under which that work was performed; and to show that the contract on the part of the asylum was signed by E. B. Wolcott alone, and proposed to follow it up with proof that his action was ratified and assented to, which agreement was received and read in evidence, subject to objection on the part of defendant.

Plaintiff's counsel then offered another contract in connection with the one last mentioned, made with S. A. Harrison by Dr. Wolcott, agent of the National Asylum for Disabled Volunteer Soldiers, the contract under which that work was done and paid for by the asylum, bearing date the 10th day of October, 1867.

Plaintiff's counsel also offered an agreement made on the first day of June, 1868, between Stephen A. Harrison on the one part, and the board of managers of the National Asylum for Disabled Volunteer Soldiers of the other part, for erecting the superstructures of the buildings known as the National Asylum, in the city of Milwaukee, under which
39 the superstructure was erected, and which is signed on the part of the asylum "E. B. Wolcott, agent N. A. D. V. S.," which two last agreements were received in evidence subject to objection on the part of the defendant.

Thereupon the witness Yates proceeded as follows: I know the work was done under these contracts, steam heater, foundation superstructure. I knew of the execution of these contracts at the time. I made the contract with Dr. Wolcott and Gen. Cavender. I was present at only one meeting of the board of managers here in Milwaukee, and then for a portion of the time only. Do not know anything about the proceedings of the board in ratifying these contracts, except I know the money was paid almost universally by myself—Dr. Wolcott's check through my hands; it was the money obtained by General Butler for the asylum.

On cross-examination the witness testified as follows: During all this time I was there at the asylum, and covering the period of all my services for which I have charged in this case I was an officer in the Army of the United States, retired colonel, drawing pay as such, as fixed by law. Dr. Wolcott is my father-in-law, and was at that time. Gen. Cavender was not here at the time, nor Gen. Butler. I do not know that Gen. Butler had any knowledge whatever of the making of this contract prior to its being executed and delivered to me. When Gen. Cavender signed this paper Dr. Wolcott was not present—
40 neither signed in the presence of the other. The money called for by this contract was since paid to me by Dr. Walcott. Cannot recollect the dates when paid; it was not after I had left the home. It was some time during 1869; I could not be positive as to the date. I am now suing for all, less the amount I received. I asked for an additional month's pay. All but that additional month's pay was paid to me by Dr. Walcott out of moneys in his hands belonging to the home. It was paid at the First National Bank. Don't think I can fix the time; it was before the commencement of this suit. It was some time in 1869.

Witness, looking at the exhibits, states the $1,987.27 was on the 10th day of November, 1869, the $5,000 on the 12th day of September, 1869. I receipted for both these bills. Exhibits here A and B are the receipts from which my name has been torn. I tore off my name. All the papers that had reference to the construction of the building were left in my papers by Dr. Wolcott. I was deputy governor of the asylum, and those papers were left with me as such; I had nothing to do with them. They were delivered to me after I left the home by Dr. Wolcott. They have been demanded of me by Dr. Wolcott; cannot remember the date; some time during the present year, within six months. I reported the fact
41 that there were papers in my possession, left in my charge for safe keeping by Dr. Wolcott. I delivered those papers on an order from Dr. Wolcott. Did not deliver these papers with them. The papers as delivered to me were not delivered as the papers of this asylum, but as belonging to Dr. Wolcott. I didn't understand the asylum had anything to do with them. I call those written contracts Dr. Wolcott's private written vouchers in case any question should arise as to his stewardship during the time I was there. As to whether it would be a remarkable way for a corporation to manage its affairs I think he was the corporation, so far as I knew; at least he represented it. Dr. Wolcott paid me both these bills and I receipted them. Did not deliver the receipts to him; he never had anything to do with the papers during his administration, except to sign them when presented to him. At the time I executed these receipts I did not deliver them to him. I understand those to be the papers belonging to that institution; and these were put among those papers. I did not afterwards take them from the files and tear my name off; they were never on the files at all. When I refunded the money I took my name off the receipts. I cannot give you the dates when this subsequent transaction—this tearing of' my name and paying back the money, took place; it may have been sixty
42 days and may have been thirty; I have means of finding out by reference to some papers in the bank; will endeavor to look and have the information here in the morning. The books will show that. The account is charged in the books. I think Dr. Wolcott and myself ran that institution pretty much as we pleased; we did what we thought was for the interest of the institution. The money that paid those bills when I receipted them—these bills I tore my name off of—was the money of the national asylum, drawn in the regular way from the treasury of the asylum. I put it in the bank; think I had a certificate of deposit for some of it; did not keep it as a separate fund; treated it like any other money of my own. It remained in that condition from 30 to 60 days. The dates of these receipts are November and September, 1869. The first payment, September 12th, of $5,000 remained in my hands more than from 30 to 60 days. Of the other payment there is $1,500 still in my possession; the balance I refunded; I won't say that the particular money, but $1,500 of the whole sum is still in my hands; I acknowledge that. It was my own when it was paid to me. It was paid to me from the institution. Dr. Wolcott expressed some concern lest by reason of our relationship he should be considered as favoring me; he said before the matter was adjusted he would prefer I
43 should place the money back in his hands until Gen. Cavender came out here, and he had Gen. Cavender's signature in addition to his own to my vouchers, to show it was the joint action of the two—favoring me in paying me the amount he had on the contract, for the reason that the whole sum was in excess of what *the* originally contemplated. They expected to spend about $170,000, and they had expended

about $300,000. He asked me to leave it in that shape until Gen. Cavender came here, and I handed him back the amount. I said this was some 30 or 60 days after the last payment was made. I cannot be positive; Gen. Cavender was not here when the money was paid back. During all that time that money was my own, subject to my control, and I had signed and delivered or executed these receipts here; like all other receipts signed by Dr. Wolcott and myself, they were made on paper furnished by the institution, at the expense of the institution. It was refunded by me. I was entitled to my own receipts—was governor of the institution; did not hold them as governor, but as Dr. Wolcott's agent; as governor, permit me to say, I had nothing at all to do with them. I was deputy governor; was appointed by resolution of the board of managers; was an officer in the Army; am still; am subject to martial law; had signed these vouchers acknowledging payment of six
44 thousand and odd dollars, and I regard them as belonging to the asylum before the money was refunded. Those were all made in duplicates; I won't undertake to say those are the original. The originals are in all cases sent to General Butler. After I received the money, and before I refunded any part of it to Dr. Wolcott, can't say whether those receipts were kept in my desk or in the office of the asylum. Was deputy governor of the asylum.

On redirect examination witness testifies as follows: That money refunded to Dr. Wolcott was refunded to the asylum and in cancellation of the payment which had been made. It was on that account I tore the receipts off.

On recross examination witness said: I do not regard Dr. Wolcott and the asylum one and the same thing.

On being asked to turn to the passage prescribing the duties of the deputy governor of the institution, plaintiff's counsel read to the court and jury article 11 prescribing the duties of the governor and deputy governor of the asylum as follows: "Under the control of the board the governor shall be charged with the internal management of the asylum to which he is appointed; he shall hire or engage all persons employed
45 in or about the same, not otherwise appointed by the president, and shall procure all articles necessary and proper for the comfort and subsistance of the inmates of the institution; he shall fix the amount of compensation to be allowed the employés, and may remove or discharge for other good cause; he shall report monthly to the president, and shall examine, correct, and certify all accounts for expenditures before the payment thereof. He shall from time to time make printed rules for the government of the officers, employés, and inmates of such asylum; he shall at all times be subject to the orders of the president or board. The deputy governor shall, in the absence of the governor, perform his duties, and at other times perform the duties of steward and such other duties as the governor may require."

Witness continues: I was called deputy governor; was the first governor of this institution out here. It was for the performance of the duties fixed by this article read by Judge Dixon that I received the salary that was paid. I know Mr. Mix, the architect here. He superintended the building there. He acted as superintendent there during the same period covered by my account. He was architect and superintendent. He received for his compensation altogether $6,000; I cannot be positive, that is my impression, during the same period my
46 services are charged for. At the time this contract was made, December 31st, 1868, January 2d, 1869, I was deputy governor of the institution; was son-in-law of Dr. Wolcott. This is in my own

handwriting except the signatures, with the exception of the note, which is in Dr. Wolcott's. That never was designed as a contract. General Cavender directed me to write it, and he signed it. Dr. Wolcott's name appears first; Dr. Wolcott was desirous to have it appear he was not the first to approve on account of our relationship. General Cavender signed it in St. Louis first. Dr. Wolcott never knew of the existence of it until it was returned to Milwaukee, signed by Gen. Cavender. The two men were never together to discuss the subject of a contract before it was made. At the time I received that money from Dr. Wolcott I did not expect and regard it in full payment of my demand. I think at that time the work had not been completed. I did accept and receive it in payment. As to the length of time after that before Dr. Wolcott and I had any talk about refunding a part of that money, I would like a little latitude on these dates. I cannot say it was 60 days, but not long before the money was refunded, he expressed some concern lest some misconstruction might be put upon the matter. The money
47 was paid to me in discharge of these two bills. I received it in discharge, and without a word passing between him & me. The vouchers were signed, and I had the money as my own money, for I think more than 30 to 60 days.

Plaintiff's counsel then read in evidence from said minutes of the proceedings of said board on page 1 a resolution introduced by Chief Justice Chase, as follows: "Resolved, That the act entitled 'An act to incorporate a national military and naval asylum for the relief of the totally disabled officers and men of the volunteer forces of the United States,' approved March 3d, 1865; and the act amendatory thereto, approved March 21st, 1866, be, and the same are hereby accepted." The witness Yates continued: "After I refunded this money it was never repaid to me. That $1,500 that was paid to me has never been refunded to the institution. I will make an affidavit to that effect at any time. That was received subsequent to the date of my leaving the institution, after the 1st of January, 1870. I think this $1,500 was paid to me by Dr. Wolcott in January, 1870; that is, the year after the receipts were given. I left there the 1st of January, 1870. It was after that
48 that Dr. Wolcott paid me $1,500. It was no part of these receipts, but a portion of that money that had been paid to me. At the time I tore my name off I returned the amount covered by these receipts. My impression is now the exact amount refunded was $6,000, and the other remained in my hands until Gen. Cavender came here. Dr. Wolcott said he would authorize the payment of $1,500, and let it go at that, and he paid me $1,500 on account. A portion of that money was, I think, a part of what had been paid me. I cannot give you the precise amount which was in my hands when I left the home. In the first place there is one receipt given by me, dated September 12th, 1869, for $5,000. That money I received and receipted for at the time of that receipt; also, another dated November 10th, 1869, for $1,087.27. That money I received and executed these vouchers for. When I paid the money back to Dr. Wolcott, my impression is that I paid him back $6,000. That left in my hands $989.27. It is my recollection that *that* subsequently Dr. Wolcott paid me money enough to make this $987.27 up to $1,500. He paid me out of moneys in his hands, as building committee, out of the funds of the institution; not his private money. There is one month's pay due me from the asylum
49 as deputy governor—$180, I think. It was changed at different times.

Defendant's counsel then read in evidence from page 59 of said min-

utes as follows: "A communication from Col. Theodore Yates was received and read, asking the board direct payment to him of a portion of his salary as deputy governor of the northwestern branch, withheld by direction of the president. On motion the subject was referred to Judge Bond and General Osborne for investigation and report at the next meeting. Governor Smyth moved the board proceed to fix the compensation due Dr. Wolcott for special services as manager in charge of construction at the northwestern asylum, when on motion the matter was referred to Messrs. Bond and Osborne for consideration and report."

Defendant's counsel also read from page 70 of said minutes: "General Osborne reported that the special committee appointed for that purpose had investigated the facts relating to claim of Dr. Wolcott for compensation for services as local manager in superintending the construction of the buildings at the northwestern asylum, and recommend that the sum of $2,000 be allowed him therefor." When on motion the following resolution was adopted: "Resolved, That the sum of $2,000 be allowed Dr. E. B. Wolcott for services other than those of a member of the board, and being in full satisfaction for all services in construction of buildings at northwestern branch."

On redirect examination witness Yates testifies as follows: The services I rendered differed from those performed by Mr. Mix in this: Mr. Mix had nothing to do with the employment of laborers or purchase of materials, simply to submit plans to the mechanics and form estimates from time to time. I changed all the plans very nearly. The internal arrangements altogether—the whole of it—some of the external. It was built upon my plans entirely.

On recross examination witness testified: I was deputy governor all the while; was paid a salary all the while I was deputy governor, with the exception of one month.

Defendant's counsel thereupon read in evidence from said minutes, on page 28, in the proceedings of the meeting of December 10th, 1868, following resolution: "Resolved, That Dr. Wolcott be requested to continue to superintend the construction of the asylum buildings at Milwaukee, and allowed therefor such compensation as the board shall thereafter fix."

Said counsel read from page 29 of said minutes as follows: "Whereas Dr. Wolcott, the local manager at Milwaukee, reports that he found it necessary to employ Surgeon Thompson and Sargeant Everston, after their discharge, to act in their several capacities for the benefit of the institution. Resolved, That the action of Dr. Wolcott is hereby ratified."

Said counsel read from page 54 of said minutes as follows: "General Martindale, from the committee to audit accounts, reported that said committee had examined the construction account at the northwestern asylum, with account of building committee, and of local manager, Dr. Wolcott, in connection therewith, and that they found the same correct and supported by proper vouchers, but deem it to call the attention of the board to large expenditures for extras in the contract for superstructure, amounting in the aggregate to $41,584.31, which amount appears to have been actually expended and is supported by proper vouchers and the personal examination and verification of the architect and master builder. On motion the report was received and accounts passed The committee also reported they found the accounts of Col. Theodore Yates correct and supported by vouchers. On motion the report was received and accounts passed. The committee stated that they had partially examined the account of

Dr. Wolcott, late acting treasurer, but for want of further information they were unable to report as to the same at this meeting."

Counsel for plaintiff then recalled said Yates as a witness, who testified as follows: I have examined as to the date when that money was refunded to Dr. Wolcott and the payment canceled; it was on the 26th of January, 1870. Mr. Mix, as architect, did not have supervision of any part of the construction of those buildings, which were under my supervision and control, except in furnishing such details as he was called upon as architect for the work. I made the purchases, &c.

On cross examination said witness testified as follows: Mr. Mix's supervision did not apply to the same part of the works as my services. He had no supervision of anything done by me. His supervision did not apply to the portion that was under my supervision. The contract reads: "Except such portion let by contracts," &c. My own supervision was on the part of the building committee. I was at the asy-
53 lum by appointment of the board of managers of the Soldiers' Home.

Counsel for defendant then read in evidence the 7th and 8th by-laws, article 7: "Salaries of officers.—The board shall fix such stated and sufficient salaries to any officer or agent of the establishment, payable in money, as they shall deem proper, which shall be in full for the services of the officer or agent, and not to be diminished during his term of office. No perquisites, fees, allowances, or advantages, other than his salary or stated pay, shall be permitted to any officer, agent, or employé of the establishment under any pretense whatever." Article 8. "Of the duties of the president.—The president of the board shall, when present, preside at all meetings of the board; he shall sign all deeds of the establishment, and affix the common seal when directed or sanctioned by the board; approve all contracts; make and sign all requisitions," &c.

The foregoing is all the material evidence produced on the trial.

Thereafter, and on the 10th day of November, 1876, the said judge charged and instructed the said jury: That they return a verdict for the defendant; to which said charge and instruction the said plaintiff, by his said counsel, did then and there duly except.

54 And in compliance with said charge and instruction the jury thereupon returned a verdict for the defendant.

And because the foregoing matters do not appear on the record of the proceedings in said cause, the said judge of said court has hereunto set his hand and seal this 28th day of December, A. D. 1876, and during the same term at which the said cause was tried.

CHAS. E. DYER,
Dist. Judge.

September 17, 1878.—This day came the plaintiff and filed his bond with J. H. Thompson as surety in the penalty of two hundred and fifty dollars, conditioned that he shall prosecute a writ of error to effect and answer all damages and costs if he fail to make his plea good, which bond is approved by the district judge, and is as follows:

Bond for costs on writ of error.

Know all men by these presents, that we, Theodore Yates, of the city and county of Milwaukee, State of Wisconsin, and J. H. Thompson, of the same place, are held and firmly bound unto The National

Home for Disabled Volunteer Soldiers in the full and just sum of two hundred and fifty dollars, to be paid to the said The
55 National Home for Disabled Volunteer Soldiers, its certain attorney, successors, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 14th day of September, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas lately, at a regular term of the United States circuit court for the eastern district of Wisconsin, held at Milwaukee on the 10th day of November, A. D. 1876, in a suit depending in said court between Theodore Yates, plaintiff, and The National Home for Disabled Volunteer Soldiers, defendant, judgment was rendered that said plaintiff take nothing by his writ, and that said defendant have & recover of the plaintiff the sum of twenty-eight & $\frac{80}{100}$ dollars, costs, and the said Theodore Yates having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said The National Home for Disabled Volunteer Soldiers citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next.

56 Now, the condition of the above obligation is such, that if the said Theodore Yates shall prosecute the said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

THEO. YATES. [L. S.]
J. H. THOMPSON. [L. S.]

Sealed and delivered in presence of—
W. C. WILLIAMS.

Approved by—

CHAS. E. DYER, *Judge.*

Whereupon a writ of error and citation issued, and a copy of said writ of error lodged for the defendant in error.

57 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss :

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file, and remaining of record in my office, being a full and complete copy of the record and proceedings in the case of Theodore Yates vs. The National Home for Disabled Volunteer Soldiers.

In testimony whereof I have hereunto set my hand, and duly affixed the seal of the said court at the city of Milwaukee, in said district, this 24th day of September, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States, the 103rd.

[SEAL.]

EDWARD KURTZ,
Clerk.

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Theodore Yates, plaintiff, and The National Home for Disabled Volunteer Soldiers, defendant, a manifest error hath happened, to the great damage of the said Theodore Yates, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 17th day of September, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the 103rd.

[SEAL.] EDWARD KURTZ,
Clerk U. S. Circuit Court, East'n Dist. Wis.

59 THE UNITED STATES OF AMERICA, *ss:*

To the National Home for Disabled Volunteer Soldiers, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of of Wisconsin, wherein Theodore Yates is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee in the said district, this 17th day of September, A. D. 1878, and of the Independence of the United States the 103rd.

CHARLES E. DYER,
Judge.

I accept service of the above citation this 17th day of September, A. D. 1878.

MATT. H. CARPENTER,
Att'y for Defendant in Error.

(Indorsement on cover:) No. 506. Theodore Yates, plaintiff in error, vs. The National Home for Disabled Volunteer Soldiers. E. Wisconsin C. C. U. S. Filed 5th October, 1878.

REC. 506—3

SUPREME COURT

OF THE UNITED STATES.

OFFICE SUPREME COURT U. S.
FILED
JAN 19. 18[illegible]
JAMES H. McKENNEY, Clerk.

THEODORE YATES,

Plaintiff in Error,

vs.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

BRIEF FOR PLAINTIFF IN ERROR.

L. S. DIXON,

Of Counsel for Plaintiff in Error.

PRESS OF LAWRENCE MILLER, MILWAUKEE.

SUPREME COURT

OF THE UNITED STATES.

THEODORE YATES,
Plaintiff in Error,

vs.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The defendant in error, The National Home for Disabled Volunteer Soldiers' is a corporation created by an amendatory Act of Congress, approved March 21st, 1866, and now found as Chapter 3, Title 59, Revised Statutes of the United States, page 943. The nature, objects and powers of the corporation will be readily understood by reference to the act. One branch of the institution known as the Northwestern Branch is located at Milwaukee, Wisconsin, and the necessary buildings at that place were in process of construction during the year 1869. Partially completed and temporary buildings having before that time been erected, the place was then and for the

year previous in use as a home for disabled volunteer soldiers, and the plaintiff in error, a disabled officer, who served in the late war for the suppression of the rebellion, had been and was in charge as deputy governor, appointed by the board of managers, under section 6, (sec. 4829, R. S.) of the act. The duties of the plaintiff in error as deputy governor as defined by article 11 of the by-laws, (record folios 45 and 46) were as follows:

"Under the control of the board, the governor shall be charged with the internal management of the asylum to which he is appointed; he shall hire or engage all persons employed in or about the same, not otherwise appointed by the president, and shall procure all articles necessary and proper for the comfort and subsistance of the inmates of the institution; he shall fix the amount of compensation to be allowed the employes, and may remove or discharge for other good cause; he shall report monthly to the president, and shall examine, correct and certify all accounts for expenditures before the payment thereof. He shall from time to time make printed rules for the government of the officers, employes and inmates of the asylum; he shall at all times be subject to the orders of the president or board. The deputy governor shall, in the absence of the governor, perform his duties, and at other times perform the duties of steward and such other duties as the governor may require."

At the time of the transaction here in question, Dr. E. B. Wolcott, of Milwaukee, and Gen. John S. Cavender, of St. Louis, were members of the board of managers, and at a meeting of the board held on the 12th of April, 1867, the following motion was made and carried:

"On motion, the president was authorized to appoint a committee to select a plan for asylum buildings at Milwaukee, to make and accept proposals for the same, to superintend their construction, and to put the present building in condition for immediate use. The president

appointed as said committee Dr. Wolcott and General Cavendar."

Subsequently at the same meeting, the minutes of the proceedings showed the following motion:

"On motion, it was unanimously agreed that the president be made a member of each of the several committees appointed yesterday and to-day."

See record, folio 35.

The president of the board of managers was Gen. Butler who resided in the state of Massachusetts.

To show the general authority possessed by Dr. Wolcott as agent and "local manager," in charge of the construction of buildings at Milwaukee, and which he had exercised by and with knowledge and approbation of the board of managers prior to the time of the making of the contract in question with the plaintiff in error, there was put in evidence on the trial below, three building contracts entered into by him, one with S. A. Harrison, bearing date the 10th day of October, 1867, another with the same party dated June 1st, 1868, and another with Tascomb & Co., made on the 23d day of November, 1868. Record folios 38 and 39.

Those contracts signed "E. B. Wolcott, Agent N. A. D. V. S.," were fully rrcognized by the board of managers as made within the scope of Dr. Wolcott's authority and valid and binding upon the corporation. The work was done and the contractors paid out corporate funds in accordance with the contracts.

Of the making of such contracts and the recognition by the board of Dr. Wolcott's authority to make them and of their validity against the corporation, the plaintiff in error, Col. Yates, had knowledge at and before the time of his entering into the contract in suit. Col. Yates entered into the contract and performed his services under it, relying upon the authority so possessed and exercised. Record folio 39.

In addition there was read in evidence (record folio 51,) the following resolution passed by the board at its meeting of the 10th of December, 1868.

"Resolved, That Dr. Wolcott be requested to *continue to superintend the construction of the asylum buildings at Milwaukee*, and allowed therefore such compensation as the board shall thereafter fix."

On the 28th of December, 1868, the plaintiff in error submitted his proposition *(folios 31 to 35 of record)* to Gen. Cavendar and Dr. Wolcott, "Managers of the National Asylum for D. V. S. and Building Com. for the N. W. Branch," "to perfect the plans. arrange all details for each department, direct the work, employ all labor, purchase all material, and put the institution in proper working order, provided the nat. asylum will pay me" (plaintiff in error) "5 per cent. on the purchases and disbursements that have been or may be made by me or under my direction outside of contracts for masons, roofers and steam heaters' work until the completion of the building; otherwise I decline to assume or feel any further responsibility for anything connected with construction of this asylum."

The contracts excepted from the above proposition for masons, roofers and steam heating works, were the contracts above referred to which had been previously made by Dr. Wolcott as local manager and agent of the corporation in the construction of buildings.

The proposition was accepted and a contract entered into by Gen. Cavender and Dr. Wolcott by a writing indorsed upon the proposition and signed by them as "Building Com. Nat. Asylum" in these words:

"Col. Theo. Yates will complete the work as proposed, and will be paid in the manner and to the amount herein named."

The plaintiff in error fully performed the services contracted for on his part for which his compensation according to the terms of the contract was the sum of $8,414.96,

of which the sum of $1500 was paid to him, and for the recovery of the balance, together with the sum of $175.00 for one month's salary as deputy governor, this action was instituted.

And further to show the authority possessed by Dr. Wolcott under the board of managers, there was read in evidence the following from the minutes of the proceedings of the board at a subsequent meeting:

"General Osborne reported that the special committee appointed for that purpose had investigated the facts relating to the claim of Dr. Wolcott for compensation for services *as local manager in superintending the construction of the buildings at the Northwestern Asylum*, and recommended that the sum of $2,000 be allowed therefor."

When on motion the following resolution was adopted:

"Resolved, That the sum of $2,000 be allowed Dr. E. B. Wolcott for services other than those of a member of the board. and being in full satisfaction for all services in construction of buildings at Northwestern Branch."

"A communication from Col. Theodore Yates was received and read, asking the board to direct payment to him of a portion of his salary as deputy governor of the northwestern branch, withheld by direction of the president. On motion the subject was referred to Judge Bond and General Osborne for investigation and report at the next meeting. Governor Smyth moved the board proceed to fix the compensation due Dr. Wolcott for special services *as manager in charge of the construction* at the northwestern asylum, when on motion the matter was referred to Messrs. Bond and Osborne for considertion and report,"

Record folios 49 and 50.

It appeared in the evidence from the testimony of Col. Yates, the only witness examined on trial, that the sum specified in the contract for his services was once paid to him by Dr. Wolcott out of funds belonging to the asylum, which sum, except the $1500, was afterwards re-

funded to the Doctor and left subject to future adjustment and payment, but never repaid.

The contract in question was signed by Gen. Cavender at St. Louis and by Dr. Wolcott at Milwaukee. Neither signed in the presence of the other.

It did not appear that Gen. Butler, the president of the board had any knowledge of the making of the contract.

During the time covered by the contract the plaintiff in error, who was a son-in-law of Dr. Wolcott, was an officer in the army of the United States, retired colonel, drawing pay as such, as fixed by law.

He was also at the same time deputy governor of the asylum, and paid a salary therefor with the exception of one month.

There was also during the same period an architect employed whose duties and labors differed from those devolved upon the plaintiff in error under the contract.

Record folios 39, 50, 52.

Counsel for defendant read in evidence from the minutes of the proceedings of the board as follows:

"General Martindale, from the committee to audit accounts, reported that said committee had examined the construction account at the northwestern asylum, with account of building committee, and *of local manager, Dr. Wolcott*, in connection therewith, and that they found the same correct and supported by proper vouchers, but deem it proper to call the attention of the board to large expenditures for extras in the contract for superstructure, amounting in the aggregate $41,554.21, which amount appears to have been actually expended and is supported by proper vouchers and the personal examination of the architect and master builder. On motion the report was received and accounts passed. The committee also reported they found the accounts of Col. Theodore Yates correct and supported by vouchers. On motion the report was received and accounts passed. The committee stated that

they had partially examined the account of Dr. Wolcott, late acting treasurer, but for want of further information, they were unable to report as to the same at this meeting." Record folios 51, 53.

Counsel for defendants also read in evidence the 7th and 8th by-laws, of the corporation:

"Article 7. Salaries of officers.—The board shall fix such stated and sufficient salaries to any officer or agent of the establishment, payable in money, as they shall deem proper, which shall be in full for the services of the officer or agent, and not to be diminished during his term of office. No perquisites, fees, allowances or advantages, other than his salary or stated pay, shall be permitted to any officer, agent or employe of the establishment under any pretense whatsoever.

"Article 8. Of the duties of the president. The president of the board shall, when present, preside at all meetings of the board; he shall sign all deeds of the establishment, and affix the common seal when directed or sanctioned by the board; approve all contracts; make ond sign all requisitions," &c.

Record folio 53.

The foregoing is believed to be a concise and accurate statement of all the facts of the case as shown by the record, the bill of exceptions in which is certified to contain all the evidence produced on the trial.

At the close of the testimony the court instructed the jury to return a verdict for the defendant to which instruction the plaintiff in error did duly except.

Record folio 53.

From the judgment rendered upon the verdict this writ was prosecuted by the plaintiff.

In instructing the jury to return a verdict in favor of the defendant, the decision of the court turned upon two questions:

1st. Whether the contract with the plaintiff in error

entered into by Dr. Wolcott and Gen. Cavender in behalf of the defendant was within the scope of the authority possessed by them or either of them as local manager or managers or as superintendents of construction as shown by the evidence; and

2nd. Whether the plaintiff in error was prohibited by Article 7 of the by-laws above quoted from entering into the contract and receiving the compensation stipulated to be paid for his services under it.

The court decided the first question in the negative, holding that there was no evidence to go to the jury on the point that Dr. Wolcott and Gen. Cavender either or both of them had authority to make the contract; and the second question in the affirmative, holding that the plaintiff in error was prohibited from receiving any sum of money from the corporation other than his salary or stated pay.

ASSIGNMENT OF ERRORS.

The errors assigned are as follows:

I.

The court erred in instructing the jury to find a verdict for defendant.

II.

The court erred in holding that he contract was not within the authority which had been delegated to Dr. Wolcott or Gen. Cavender, or both, and that there was no evidence to submit to the jury upon that question.

III.

The court erred in holding that the plaintiff in error was prohibited from entering into the contract and receiving the compensation fixed by it for his services.

POINTS OF LAW.

I.

There was clear and satisfactory evidence of authority delegated by the board to Dr. Wolcott alone, as local manager and superintendent of construction, quite sufficient to require the submission of that question to the jury and the court was in error in withholding it from the jury and directing verdict for defendant on that ground. The contract was, however, entered into by both Dr. Wolcott and Gen. Cavender, the managers and superintendents of construction appointed under the original resolution.

It is apparent from all the evidence that it was never the intention of the board that all the members of the committee to select a place, make and accept proposals and superintend construction, should act jointly, but that a several execution of such authority was contemplated. This is apparent from the situation of the parties at the time the original appointment was made as well as the subsequent action of the board giving a construction to such appointment and showing in particular what power and authority the local manager and member of the committee, Dr. Wolcott, should possess. At the time of the appointment, Dr. Wolcott was the only member of the committee residing at Milwaukee, and who would be qualified by a familiarity with the situation and knowledge of the facts and circumstances to act with efficiency and promptness. It would be impracticable for Gen. Cavender, who resided at St. Louis to do so, and still more impracticable for Gen. Butler residing in Massachusetts, and visiting the institution only at long intervals of time. The adding of Gen. Butler to the committee was merely formal. It was obviously so intended, for after the appointment of the committee we find Dr. Wolcott, with the knowledge and approbation of the board, in every in-

stance, save only in the case of the contract here in suit which was first signed by Gen. Cavender, exercising a several or sole authority throughout the transaction of the business.

The case was not, therefore, one of joint agency and to which the rule is applicable that such agents must concur to validate a joint act of agency but one where the act of any or more of the agents, within the scope of their authority, binds the principal.

"We must," says Mr. Wharton, "at the same time remember that the authority to the agents may be given in in such terms as to authorize a several execution, or an execution by a majority or other number; and *in the absense of express words*, if the power is so exercised *under circumstances justifying the inference that the principal intended that less than the whole number might act*, the principal is bound to *those who have dealt with the agents acting upon such inference*." Commentary on Agency and Agents, §. 141.

It is confidently submitted that the present case falls fully within the principle so laid down by the learned author. There were no express words limiting the agents to a joint execution. There were circumstances clearly justifying the inference that the board intended that less than the whole number of the committee might act and that the act of the local member alone would bind. He had so acted on several previous occasions, and his action had been ratified and approved by the board. He had been referred to and spoken of in the minutes of the proceedings of the board at several different times as the local manager and superintendent possessing a several and distinct authority to act in the premises. The plaintiff in error contracted with him acting upon the inference to be so drawn.

An authority which seems altogether in point upon this question is *Hawley et al. v. Keeler et al.*, 53 N. Y., 114.

The defendants in that case who were the patrons of a cheese factory, had appointed a committee of three, B. M. and K., to sell their cheese for a year. B. did not act to any extent with the committee. Frequent sales were made by the other two without his concurrence, and the money arising therefrom was distributed among and received by the defendants; and plaintiffs had so purchased prior to the transaction in question. In November, 1868, M. and K. entered into a contract of sale to the plaintiffs, and the question in the case was as to the validity of such contract, whether it was binding upon their principals or not, being made by M. and K. alone.

The court say: "The general rule, that a joint execution must be had of an authority given to several, has been made to yield for the benefit of trade, and to meet supposed necessities, in contracts made by one of several joint owners of ships, and in case of sales, made by one of two factors, of goods consigned to them for sale. In this case, it appeared that Bogardus had not acted, to any extent, as one of the committeemen during the year. There had been frequent sales made by Keeler and Morse before this sale without his advice or concurrence; and the money arising therefrom had, from time (as may be inferred from the evidence), been distributed among and received by the defendants. The plaintiffs, in July previous, made a purchase of the two acting committeemen, without participation of Bogardus in the transaction; and the cheese embraced in the contract in this case was afterward, as the proof tends to show, sold to other parties without consultation with him. The patrons lived in the vicinity of the factory. Some of them, not on the committee, were present at times when the question of the sale of cheese was considered. The question is not without difficulty; but we are of the opinion that the jury, in view of the character of the agency, the manner in which, for a long time, the authority had been exercised, the prior

dealings with the plaintiffs, the receipt by the defendants from time to time of the proceeds, from sales made by Keeler and Morse alone, without dissent or objection to the contracts made, might lawfully find that the patrons had knowledge of and assented to the execution of the power of sale by a majority of the committee. It cannot be assumed under the circumstances that the principals were ignorant of the conduct of their agents; but the presumption is that they understood the course of the business and dealings with the common property, especially, as no evidence was given on their part that they were not informed thereof. The concurrence of Keeler and Morse, two of the committeemen, in making the contract sued upon, was sufficiently shown, and the defendants were bound by it."

In the case at bar there was no evidence that Gen. Butler ever acted with the committee at all, as in fact he never did. And neither was there any evidence that Gen. Cavender ever acted in any instance except in signing the contract in question. The whole matter, as the entire proceedings of the board of managers show, was committed and intended to be committed to the sole and exclusive superintendence and control of Dr. Wolcott, except as he might find it convenient or advisable to consult with one or the other, or both of the other members of the committee.

There was evidence in the case upon this point which clearly ought to have been submitted to the jury.

II.

The plaintiff in error was not prohibited by Article 7 of the by-laws from entering into the services contracted for and receiving the compensation agreed to be paid.

It is clear that the services rendered under the contract

were no part of the duties imposed upon him as deputy governor under Article 11 of the by-laws. As deputy governor he had nothing whatever to do with the work of construction of buildings. The by-law declaring his duties contemplated no such work or labor as that contracted for by the building committee. It was competent, therefore, for the committee or for Dr. Wolcott as the recognized sole acting member of it, to contract with the plaintiff for such services, if he was able to render them without interfering with his other duties, and to agree to pay him for them in the same manner as a like contract would have been made with any third person, unless the plaintiff was prohibited by Article 7 of the by-laws from receiving such compensation.

Article 7 properly understood and construed contains no such prohibition. It declares that the board shall fix the salaries to any officer or agent of the establishment, "which shall be in full for the services of the officer or agent." The services here spoken of are such services as are prescribed by the by-laws. The fixed salary of the deputy governor, for example, is for such services as the by-law prescribing his duties required him to perform. The prohibition in the second sentence of the article as to perquisites, fees, allowances or advantages other than the salary or stated pay of the officer, plainly means perquisites, fees, allowances or advantages for or on account of the services which the officer is required to perform, and for which the salary or stated pay is given, and the sentence is to be construed as if the words "for his services," had been expressed. or as if it read: "No perquisites, fees, allowances or advantages, other than his salary or stated pay, shall be permitted to any officer, agent or employe of the establishmeut under any pretense whatsoever for his services as such officer, agent or employe."

The case is a proper one for the application of the maxim: "*General words may be aptly restrained accord-*

ing to the subject matter or persons to which they relate."

Broom's Leg. Max. 646.

The subject matter is compensation for services rendered under the by-laws, and the prohibition only extends to perquisites, &c., for such services, and cannot be construed as embracing compensation for other and entirely distinct services performed by the officer under other and different lawful authority and employment. If, as we have attempted to show, Dr. Wolcott and Gen. Cavender had authority to employ any one to render the services named in the contract, then they were not prohibited from csntracting with the plaintiff in error, nor was he forbidden from receiving pay for such services.

III.

The clause in Article 8 of the by-laws that the president "shall approve all contracts," was relied upon in the court below to show the invalidity of this contract. It was said that the contract did not appear to have been approved by the president. No express or written approval of the president was shown. Neither was it shown that the contract had ever been disapproved. But a sufficient answer to this objection is that the contract or Dr. Wolcott's authority to make it, was approved by the whole board. This authority was delegated or its exercise known and approved by the same body by which the by-law was enacted, a body which could repeal the by-law or disregard or dispense with its provisions at its pleasure in any particular instance. Such was the effect of the action of the board in delegating or ratifying the powers exercised by Dr. Wolcott in making contracts for the construction of buildings. It was a suspension of the by-law *pro hac vice*. The approval of or authority from the board

itself to make the contract being shown, the action of the president become unnecessary.

It is submitted that the judgment below was erroneous and should be reversed.

L. S. DIXON,
Of Counsel for Plff. in Error.